(1)

Supreme Court, U.S.
FILED

001139 JAN 16 2001

No.

IN THE

Supreme Court of the United States

RONALD BERNARD WALDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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(Appointed under CJA)

January 16, 2001

22 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to follow its own precedent in refusing to grant Petitioner a new trial where the evidence to show movement of the firearm in interstate commerce was inadmissible hearsay.

2. Whether the decision of the Court of Appeals conflicts with controlling precedent from the same circuit, as well as a case decided in another circuit?

3. Whether the Court of Appeals erred in failing to grant Walder a new trial where unduly prejudicial evidence of an ATF form, prepared outside the applicable statute of limitations, was admitted into evidence to convict him.

4. Whether there is sufficient evidence to support Walder's conviction of unlawful possession of a firearm by a convicted felon.

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No.

IN THE

Supreme Court of the United States

RONALD BERNARD WALDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

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On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ronald Bernard Walder ("Walder") respectfully submits this Petition for Writ of Certiorari.

OPINION BELOW

Walder petitions for review of an unpublished opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated September 14, 2000. That decision is reported at 234 F.3d 29 (5th Cir. 2000).

STATEMENT OF JURISDICTION

Walder's conviction was affirmed by an unpublished opinion of the Fifth Circuit Court of Appeals entered on September 14, 2000. Walder's Petition for Rehearing and suggestion for Rehearing En Banc were denied by an order filed on October 17, 2000.

This court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Walder was convicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which states:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year...to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition, which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Prior to jury trial on October 19, 1999, the Government filed its list of witnesses. The Government identified two of its probable fact witnesses as agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), namely Mark Wilson and Terry Schrader. The Government's witness list did not list any person as an expert witness (R 72-73). Additionally, prior to trial, Walder filed a Motion In Limine to preclude mention of any evidence of possession of the weapon which was beyond the five year statute of limitations. (R43-47). The jury convicted Walder on the sole count contained in the indictment and he was thereafter sentenced by the district court.

The indictment charged Walder with illegal possession of one firearm on or about August 5, 1998. The evidence showed that Walder purchased the firearm, a Norinco MAK-90 semi-automatic rifle, serial number 9303327 on September 19, 1993, from a store called The Bullet Hole #2 in Grand Prairie, Texas. (TR 97-103) Several years before August 5, 1998, Walder's mother, aware that he had a prior felony conviction, demanded that Walder surrender possession of

this firearm to her so that she could keep it at her house and deprive Walder of any further access to the gun. (TR 124-127). Walder's mother, Mrs. Delores Bryant, testified that she took possession of the firearm from Walder; kept it in a closet in her house; that she never let Walder know where it was stored; and that he never had access to it. She considered it to be her gun after she had taken it from her son and was not simply holding it for him. (TR 131). When Walder needed $80.00 to pay his rent, he contacted his mother and first attempted to borrow the money. She later contacted him and said she did not have $80.00 to loan him but he could have someone else physically carry the gun to a pawn shop to try to get money, provided that Walder would not touch it or have possession of it at any time during the trip to the pawn shop. (TR 128-131).

Walder's fiancée, Linda Bigham, who was also indicted and acquitted on nearly identical charges arising out of the same sequence of events involving the firearm and pawn shop, also testified at trial. She testified that during the three years that she lived with Walder, he never had possession of the gun. She further corroborated the testimony of Mrs. Bryant that during the trip to the pawn shop with the gun on or about August 5, 1998, Walder was never allowed to touch the gun or have control over it. Rather, his mother insisted that another man carry the gun every step of the way and into the pawn shop. (TR 137-149). Furthermore, it was uncontroverted that Linda Bigham actually pawned the gun and represented that she was the owner of the gun or had the right to its possession. (GX1 and GX2).

The only evidence at trial concerning movement of this weapon in interstate commerce was provided solely by Government's Exhibit 6, which is a tracing summary prepared by some unknown person at the ATF. That exhibit was admitted during the testimony of Special Agent Terry Schrader of the ATF, over Walder's timely hearsay objection. (TR 109-110; 114-115). The immediate seller of the weapon to Walder, Mr. Donald Harold, never testified that the weapon

actually moved in interstate commerce, he only stated that he completed federal form 4473 (GX7), and sold the gun to Walder. Mr. Harold never said where the gun came from or where it was manufactured. (TR 97-103). The only other witness who testified in the Government's case, Scott Ferguson of Plus Pawn Shop, testified that he did not know where the gun was made, but acknowledged that Pomona, California was stamped on a part of the gun. (TR 91-92). Agent Schrader conceded that the sole evidence and sole basis for his knowledge and testimony about the movement of this weapon from China to Pomona, California and then from Pomona, California to RSR in Grand Prairie, Texas is the information that is contained in Government's Exhibit 6. (TR 115). Agent Schrader was not identified nor did he testify as an expert witness. Agent Schrader admitted he was a trainee at the ATF. (TR 116).

During the course of trial, Walder moved for a judgment of acquittal at the close of the Government's case in chief and at the close of all the evidence. (TR 122 and 159). Those motions were denied and Walder's motion for new trial or judgment of acquittal notwithstanding the verdict, filed on October 29, 1999 (R 163-166) was also overruled by the District Court. (R 182-184).

The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291.

ARGUMENT

A. The Fifth Circuit Failed to Follow Its Own Precedent Which Required that Petitioner Be Given A New Trial.

The decision by the Fifth Circuit Court of Appeals in *United States v. Davis,* 571 F.2d 1354 (5th Cir. 1978), requires that Walder's conviction be reversed and this case remanded for a new trial. In that case, the district court also

improperly admitted an ATF tracing form to prove the shipment or transportation of a firearm in interstate commerce. On a nearly identical record, the Fifth Circuit held that the district court's error was prejudicial and warranted a new trial.

In *Davis*, an ATF agent testified that ATF forms F7520.5 and F7520.4 were tracing forms written by a person at the ATF making the trace and some custodian of records from the manufacturer of a firearm. The foundation that the Government presented at trial for admission of those two exhibits was that tracing was a regular routine conducted by the ATF and that the ATF relied on the results of this tracing procedure. Also, the special agent in the *Davis* case maintained the completed forms in his investigation file and had kept exclusive possession, custody and control of such file. The district court admitted the exhibits under the hearsay exception for records of regularly conducted activity. Fed. R. Evid. 803(6). Just as in the present case, it was evident in *Davis* that the information entered on the ATF forms did not originate with that bureau. Furthermore, the records in *Davis*, just like GX6 in this case, contain hearsay information from several sources, including the unknown agent at the ATF National Tracing Center and other persons reporting transfers of the weapon to ATF.

Davis held that the ATF tracing form could not be treated as a record of regularly conducted activity of the ATF because it satisfied virtually none of the criteria of Rule 803(6) of the Federal Rules of Evidence. Furthermore, *Davis* rejected the Government's argument that the admission of the tracing form was harmless (*Id.* at 1358, n.7.) and also rejected the Government's argument that the exhibit could be held to be properly admissible under a residual hearsay exception, then codified as Rule 803(24) and now codified as Rule 807 of the Federal Rules of Evidence. (*Id.* at 1360, n.11.) The result was a new trial was granted.

Davis was followed and applied by the District of Columbia Circuit in *United States v. Houser*, 746 F.2d 55, 60-

61 (D.C. Cir. 1984). That case held that the ATF tracing form should not have been admitted as a business record. The D.C. Circuit also concluded that the admission of that tracing form was prejudicial and warranted reversal of the conviction.

Rather than follow *Davis*, the panel here cited *United States v. Simmons*, 773 F.2d 1455 (4th Cir. 1985) and *United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996) and failed to address the application of *Davis*. While the panel opinion does not expressly state that the ATF trace report is admissible under the residual exception to the hearsay Rule, Fed. R. Evid. 807, the citation to these two other decisions implies that the panel has concluded that this trace report is admissible under that residual hearsay exception.

In *United States v. Simmons*, the Fourth Circuit did hold that an ATF trace form was admissible under the residual exception to the hearsay rule, then codified as Rule 803(24) of the Federal Rule of Evidence. However, the Fourth Circuit in *Simmons* did agree with the Fifth Circuit's holding in *Davis*, that such ATF trace reports are not admissible as business records of the ATF, pursuant to Rule 803(6). *Simmons* is further distinguishable from the present case because there was independent testimony by the ATF agent in the *Simmons* case about the location of the manufacturing plant of the Savage Arms Company. That independent testimony of the ATF agent was "sufficient to show the required interstate commerce nexis for the Savage rifle." *Simmons*, 773 F.2d at 1461.

In the present case, Special Agent Schrader of the ATF did not offer any such independent testimony that would provide the requisite interstate nexis and conceded that the sole basis for his knowledge and testimony about the movement of the weapon from China to California to Texas is the information contained in the ATF trace report, GX6 (TR115).

Additionally, although the Fifth Circuit has cited with approval the reasoning of the Fourth Circuit in *Simmons* in the

more recent decision of *United States v. Ismoila*, the latter decision is readily distinguishable from the present case. *Ismoila* involved a prosecution for a large number of forged and false credit card transactions. The Government introduced some evidence of the various credit cardholders reporting false transactions involving their cards. The Fifth Circuit did uphold the admissibility of such evidence under Rule 807. Again, however, there was independent evidence in *Ismoila* providing a strong circumstantial guarantee of the trustworthiness of the otherwise hearsay information. It was undisputed that an expert,"[a] fraud investigator . . .with 22 years of experience . . .in over 1,000 fraud investigations . . . had only seen three or four instances in which the card holder was lying about not making the charges." *Ismoila*, 100 F.3d 393. There is no such supporting expert testimony in this case.

Finally, the panel opinion in this case states that the gun "is clearly marked that it was manufactured in China by Norinco," apparently relying upon photographs of the gun submitted as a supplement to the record on appeal. These photographs are not in evidence, only the weapon itself. The record further shows that although the jury was offered the opportunity to examine the weapon during its deliberations, it never did so and never saw any of these markings on the weapon. (TR 187-190). Rather, the jury only considered the testimony from the witness stand.

B. The Court of Appeals Should Have Granted Walder a New Trial Because an ATF Purchasing Form (GX7), Was Improperly Admitted.

The Government introduced a September 19, 1993, firearms transaction record (GX7) against Walder at trial. This exhibit purports to show that Walder bought two MAK-90 semi-automatic rifles in 1993 and that Walder falsely answered one of the questions in this form in order to buy those weapons. Walder timely objected to the admission of GX7 pursuant to Rule 403 of the Federal Rules of Evidence

(TR 97-99). The Court admitted the exhibit and gave a limiting instruction. (TR 98-102).

The admission of GX7 against Walder was unfairly prejudicial for several reasons. First, it allowed the jury to consider conduct by Walder for which he could not be prosecuted, *i.e.*, making a false statement on the form in order to acquire the firearm. The Government was barred from prosecuting Walder for that offense due to the statute of limitations. 18 U.S.C. § 3282. Second, the admission of the exhibit allowed the Government to suggest to the jury in closing argument that Walder "bought some weapons he shouldn't have had. He stashed *one* and put *one* at his mothers." (TR 174, emphasis added). Walder was never indicted for unlawful possession of *two* weapons and there was no evidence during the trial concerning a *second* weapon. The mention of a *second* weapon, about which there was no evidence at trial, was calculated to lure the jury into declaring guilt on a ground different from proof specific to the offense charged. *See generally Old Chief v. United States*, 519 U.S. 172 (1997).

The Government's proffered explanations for admitting this exhibit showed that it had little probative value. First, the Government argued that the exhibit would contradict Walder's statement given to the ATF agents as to when he acquired the weapon. (GX5) Second, the Government argued that GX7 showed proof of ownership five years prior to the offense charged. These points have slight probative value since Walder never denied ownership or possession of the weapon at a previous time. Further, all of the evidence showed that another member of his family took possession and control of the weapon. The date when Walder may have first acquired the weapon is irrelevant to the offense charged in the indictment. If it were otherwise, Congress would have proscribed felons from purchasing or buying weapons – not from possessing them.

The admission of GX7 unfairly prejudiced Walder because the Government led the jury to believe that Walder

may have another assault rifle stashed somewhere – even though that was not the subject of the indictment and there was absolutely no evidence concerning a *second* weapon. For these reasons, the admission of the GX7 was an abuse of the district court's discretion and the court of appeals erred in failing to grant a new trial due to this harmful error.

C. Alternatively, the Court of Appeals Should Have Reversed Walder's Conviction Because the Evidence is Insufficient to Sustain his Conviction on Two Elements.

Walder timely challenged the sufficiency of the evidence to sustain his conviction. The Government was required to prove that the weapon moved in interstate commerce before Walder possessed same. In the absence of the inadmissible ATF tracing summary, there is virtually no evidence of any interstate connection or movement of this weapon.

Second, the evidence in the record is insufficient to show Walder actually possessed the weapon on the date charged in the indictment, August 5, 1998. A review of the entire record demonstrates, on the contrary, that Walder and those who accompanied him to the pawn shop on or about August 5, 1998, took great caution to ensure that Walder never actually possessed that weapon. His mother insisted that another person carry the gun and went on the journey herself to make sure that her instructions were followed. Walder's fiancée testified that it was never Walder's idea to take the gun to the pawn shop and that the suggestion was made by others. Furthermore, the Government's own evidence, exhibits 1 and 2, reflect that Linda Bigham represented to the pawn shop that she was the owner of the gun or had the right to possess same. Under these circumstances, the record reflects that Walder did not have the intent to knowingly possess the firearm on the date alleged on the indictment either in any actual or constructive sense.

CONCLUSION

Petitioner Ronald Bernard Walder respectfully requests that this Court grant his Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit and hear his case on the merits. Upon final hearing, Walder requests an acquittal or alternatively, a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER
RONALD BERNARD WALDER
(Appointed under CJA)

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10069

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

RONALD BERNARD WALDER
Defendant - Appellant

U.S. COURT OF APPEALS
FILED
OCT 17 2000
CHARLES R. FULBRUGE, III CLERK

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 09/14/00, 5 Cir., I F.3d

Before JOLLY, WIENER, and PARKER, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.App.P. and 5THCIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular

active service not having voted in favor, (FED. R. App. P. and 5THCIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE
REHG-4A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10069
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RONALD BERNARD WALDER,
Defendant-Appellant.

U.S. COURT OF APPEALS
FILED SEP 14 2000
CHARLES R. RULBRUGE, III CLERK

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:99-CR-185-1-T

Before JOLLY, WIENER, and PARKER, Circuit Judges.
PER CURIAM:*

Ronald Bernard Walder was convicted by a jury for being a felon in possession of firearm in violation of 18 U.S.C. § 922(g)(1). Walder contends that there was insufficient evidence to support this conviction. A §922 (g)(1) conviction requires the government to prove that (1) the defendant was a convicted felon; (2) who possessed a firearm; and (3) that the firearm was in or affected interstate

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R.47. 5.4.

commerce. *United States v. Gresham*, 118 F.3d 258, 265 (5th Cir. 1997). The standard of review of the sufficiency of evidence to support a conviction is whether any reasonable trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt. *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998).

Walder stipulated that he had a prior felony conviction. Walder argues that the government failed to prove the "in or affecting commerce" element because the Bureau of Alcohol, Tobacco, and Firearms (ATF) firearms trace summary admitted into evidence was hearsay. The government asserts that the ATF trace summary is admissible under the residual exceptions to the hearsay rule contained in Fed. R. Evid. 807 (formerly Rule 803(24)). The Fourth Circuit has approved of the current ATF procedures in *United States v. Simmons*, 773 F.2d 1455, 1460 (4th Cir. 1985), and we have cited the reasoning with approval. *United States v. Ismoila*, 100 F.3d 380, 393 (5th Cir. 1996). Even if the trace report was not admissible, the weapon is clearly marked that it was manufactured in China by Norinco. Contrary to Walder's argument, the jury did not have to draw multiple inferences to conclude that a weapon marked "Made in China" had traveled in or affected interstate commerce before it arrived in Grand Prairie, Texas. *See* blue brief, 14-15. The evidence is sufficient to prove that the firearm was "in or affected interstate commerce" for purposes of § 922(g)(1), regardless of whether the ATF trace summary is admissible. *See Scarborough v. United States*, 431 U.S. 563, 575 (1977)(concluding that Congress intended to require only the minimal nexus that, at some time, the firearm had been in interstate commerce).

Walder also argues that it was error to admit an ATF form showing that he purchased the firearm in question as well as another weapon in 1993. Assuming arguendo, that the admission of the 1993 form was improper, the error was harmless. The district court specifically admonished the jury

that the prior possession was not to be considered and Walder had already stipulated to being a felon. *United States v. Williams*, 957 F.2d 1238, 1243-45 (1992)(harmless-error determination is made by examining the alleged error in relation to the entire proceedings).

Walder has challenged the sufficiency of the evidence supporting the jury's finding that he possessed the weapon. Possession of a firearm may be actual or constructive and may be proven by circumstantial evidence. *United States v. DeLeon*, 170 F.3d 494, 496 (5th Cir.), *cert. denied*, 120 S. Ct. 156 (1999). "Constructive possession is the exercise of, or the power or right to exercise dominion and control over the item at issue." *United States v. Speer*, 30 F.3d 605, 612 (5th Cir. 1994)(internal quotation and citations omitted). Walder's statement to the ATF agent that he took the weapon to be pawned for the purpose of paying his rent establishes that he had dominion over the weapon even if the testimony that he did not touch the weapon was true. There is sufficient evidence to support Walder's conviction.

AFFIRMED.

United States District Court

Northern District of Texas
Dallas Division

UNITED STATES OF AMERICA

v.

RONALD BERNARD WALDER

Defendant.

U.S. District Court
Northern District of Texas
Filed
Jan 12, 2000
Nancy Doherty, Clerk
Deputy

Case Number 3:99-CR-185-T (01)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, **RONALD BERNARD WALDER**, was represented by Jay A. Brandt.

The defendant was found guilty on Count I by a jury verdict on October 20, 1999 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 USC § 922(g)(1)	Felon in Possession of a Firearm	August 5, 1998	1

As pronounced on **January 6, 2000**, the defendant is sentenced as provided in pages I through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 100, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 12th day of January, 2000.

/s/
ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 455-25-5134
Defendant's Date of Birth: 02/29/60
Defendant's Address: 2715 Marburg Street, Dallas, Texas 75215
Defendant's USM No: 33337-077